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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 391.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
JOHN F. DEVINE, as Administrator of the Estate of WILLIAM J. MASON, Deceased,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM JUDGMENT, OR TRANSFER TO THE SUMMARY DOCKET, WITH STATEMENT AND ARGUMENT OF DEFENDANT IN ERROR, IN SUPPORT THEREOF.

JAMES C. McSHANE,
Attorney for Defendant in Error.

Geo. Hornstein Co., Printer, Chicago.

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MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM JUDGMENT, OR TRANSFER TO THE SUMMARY DOCKET.

And now comes defendant in error, by his attorney of record herein, and moves this Honorable Court,

First: To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no federal question being involved therein, especially none which was properly raised and preserved; or,

Second: To affirm the judgment and decision of the Supreme Court of the State of Illinois, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions on which the decision of this case depends are so frivolous as not to need further argument; or,

Third: To transfer this cause for hearing to the summary docket, if this court should refuse to dismiss, or affirm, because the case is of such a character as not to justify extended argument; and that additional damages be assessed and awarded defendant in error, as for delay, etc.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 391.

The Chicago, Rock Island & Pacific Railway Company,
Plaintiff in Error,
vs.
John F. Devine, as administrator of the estate of William J. Mason, Deceased,
Defendant in Error.

NOTICE OF MOTION.

To Messrs. M. L. Bell and A. B. Enoch, Attorneys for plaintiff in error:

YOU ARE HEREBY NOTIFIED, that on Monday, October 25th, 1915, at the opening of court on that date, I shall make and present, before said Supreme Court of the United States, a motion on behalf of defendant in error, *first,* to dismiss the writ of error herein, on the ground that the Supreme Court of the United States has not jurisdiction thereof, no federal question being involved therein, especially none which was properly raised and preserved; or *second,* to affirm the judgment and decision of the Supreme Court of the State of Illinois, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions on which the decision of this case depends are so frivolous as not to need further argument; or *third,* to transfer this cause for hearing to the summary docket, if the court should refuse to dismiss, or affirm, because the case is of

such a character as not to justify extended argument; and that additional damages be assessed and awarded defendant in error, as for delay, etc.; and that I shall file, in support of said motion, a printed statement and argument, a copy of which is hereto attached and delivered to you.

Dated, Chicago, Illinois, October 2nd, A. D. 1915.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

Received a copy of the foregoing notice, and the motion, statement and argument therein referred to this 2nd day of October, A. D. 1915.

M. L. BELL,
A. B. ENOCH,
Attorneys for Plaintiff in Error

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1915.

No. 391.

The Chicago, Rock Island & Pacific Railway Company,
Plaintiff in Error,
vs.
John F. Devine, as administrator of the estate of William J. Mason, Deceased,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT.

This suit was brought by defendant in error against the plaintiff in error, under the Federal Employers' Liability Act (35 Stat. at L., 65, Chap. 149), to recover damages on account of the death of the said William J. Mason, who was killed while working as a switchman for plaintiff in error, at Chicago, Illinois, on or about June 20, 1910, and through the alleged negligence of plaintiff in error.

The suit resulted in a judgment in favor of defendant in error, and against plaintiff in error, in the sum of $15,000, which judgment was affirmed by the Illinois Appellate Court and the Illinois Supreme Court, and the case was brought to this court by writ of error, which was ordered by one of the Justices of the Supreme Court of Illinois.

Plaintiff in error invokes the jurisdiction of this

court upon the ground that it especially set up or claimed a right, privilege or immunity under the Federal Employers' Liability Act, and that the decision of the state court was against such right, privilege or immunity. The following opinion rendered by the Supreme Court of Illinois (reported in 266 Illinois, 248) contains a full statement of the case, and of the questions involved.

John F. Devine, Admr., Defendant in Error, v. *The Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error.*

Mr. Justice Dunn delivered the opinion of the court:

John F. Devine, as administrator of the estate of William J. Mason, deceased, recovered a judgment for $15,000 against the plaintiff in error, the Chicago, Rock Island and Pacific Railway Company, for damages on account of the death of his intestate, alleged to have been caused by the negligence of the plaintiff in error. The Appellate Court having affirmed the judgment, the record has been brought before us by a writ of *certiorari.*

The deceased was a switchman in the employ of the plaintiff in error in the City of Chicago. He was head brakeman of a crew consisting of an engineer, fireman, conductor, rear brakeman and head brakeman. This crew did miscellaneous switching in various parts of the yards, made deliveries of cars to different industries and to the yards of other railroad companies, and took cars from these different places to the yards of the plaintiff in error. On June 20, 1910, this crew, with an engine, went north from the plaintiff in error's yards at Blue Island to One Hundred and Third street, a distance of two miles, where the yards of the Panhandle Railroad were located, just west of the plaintiff in error's railroad. The plaintiff in error had three tracks extending north and south at this place, numbered,

from west to east, 5, 4 and 3. Beginning at One Hundred and Third street and extending north the Panhandle had three tracks, known as the east track, the middle track and the lead track. Connecting the Panhandle tracks with the main line of the plaintiff in error was a track leading south across One Hundred and Third street and connecting with track 5 of the plaintiff in error just south of One Hundred and Fourth street. Joining this track was another switch from track 5 to track 4, and still farther south was a connection between tracks 3 and 4 of the plaintiff in error. On the morning of the accident there were forty-five cars in the Panhandle yards to go south to Blue Island,—twenty-three just north of One Hundred and Third street on the middle track of the Panhandle road, and twenty-two just west of the twenty-three, on the lead track. The engine backed in on the middle track, coupled to the twenty-three cars and the air on them was connected with the engine. These cars were pulled south, backed in on the west track of the Panhandle yards and coupled to the twenty-two cars upon that track, but the air on these twenty-two cars was not connected with the engine. The train then started south out of the Panhandle yards and crossed to the plaintiff in error's track 5 and from there to track 4. The deceased was standing on the top of the train, about half way back, giving signals to the conductor, who was south of him, and to the engineer. Just as the last car cleared the switch between the track of the Panhandle and track 4 of the plaintiff in error the train came to a sudden stop, and the deceased was thrown from the top of the car on which he was standing and killed.

The suit was brought under the Federal Employers' Liability Act. The declaration alleged that on the day of the accident the plaintiff in error owned and operated a railroad from Chicago into other states and was engaged as a common carrier in commerce between the states, and that the deceased was employed as a switchman with a certain engine

and cars, and at the time of the accident was employed in commerce between the states. The negligence charged was that the engineer negligently stopped his train with great and unusual suddenness, by reason of which the deceased was thrown from the top of the car to the ground and killed.

The plaintiff in error contends that the court erred in refusing to direct a verdict for it because there was no competent evidence that the particular service in which the deceased was engaged at the time he was killed was interstate commerce. The case was tried before the decision of the case of *Behrens* v. *Illinois Central Railroad Co.*, 233 U. S., 473, and the theory of the defendant in error was that the deceased, being regularly employed indiscriminately in interstate and intrastate commerce, and his work and safety having a real and substantial relation to and connection with interstate commerce, was therefore employed in interstate commerce within the meaning of the Federal Employers' Liability Act. Probably on account of the theory on which the case was tried, the evidence that any car among those being moved at the time the deceased was killed was then engaged in interstate commerce is slight. The efforts of the counsel for the defendant in error in accordance with his view of the law were directed to showing that the railroad of the plaintiff in error handled, indiscriminately, interstate and intrastate traffic at the same time and in the same trains, and there was little direct or positive evidence of the make-up of the particular train. The conductor of the deceased's crew did, however, testify that this train was made up of foreign cars and cars of the plaintiff in error,—of cars from out of the state and cars from in the state. This was not enough, for this was not evidence that the cars from out of the state or the cars from in the state were then engaged on an interstate trip. In answer, however, to the question, "Some cars going out of the state and some going to points in the state?" the witness answered, "Yes." This is evidence that

some of the cars in the train were engaged in an interstate trip,—at least that one of them was. It is slight, but it is not contradicted. Counsel for the plaintiff in error say that counsel for the defendant in error could have shown, by records, the origin and destination of every loaded or empty car in the switch train. It was at least as easy for the plaintiff in error to produce these records as for the defendant in error, and no presumption arises against the latter from his not producing the records but relying on the *prima facie* case made by the uncontradicted testimony of his witness. There was evidence tending to show that the deceased was engaged in interstate commerce when he was killed, and the weight of it is not for our consideration.

It is further insisted that there is no evidence in the record from which the negligence of the engineer can be reasonably inferred; that the intention, as the cars were being hauled out of the Panhandle yards, was to pull them across One Hundred and Third street and stop and connect the air-brakes on the last twenty-two cars; that it was the duty of the deceased to make this connection, which was usual and customary under similar circumstances; that the deceased signaled the engineer to stop after the last car had crossed One Hundred and Third street, and that the engineer, in response to the signal, did stop the train, which was moving very slowly. On the other hand, the defendant in error claims that it was not the intention to connect the air and that it was not usual and customary to do so under similar circumstances and that the deceased gave no signal to stop the train for that purpose; that the train slowed up so that the switchman could turn the switch after the last car had passed it and then run and get on the train; that no signal was given to stop, but the engineer did stop very suddenly, causing a crash which was heard for a great distance and caused people to leave their occupations and go to see what was the matter, and that in consequence of the suddenness with which the train was stopped

the deceased was thrown to the ground and killed. There was evidence fairly tending to support the theory of the defendant in error.

What has been said disposes of the contention that the plaintiff could not recover because the accident was the result of an ordinary risk of the employment of the deceased. Under the Federal Employer's Liability Act the fellow-servant doctrine was not available as a defense, and if the accident was caused by the negligence of the engineer in suddenly stopping the train with unnecessary violence the deceased did not assume the risk of such negligence. The court did not err in refusing to direct the verdict.

The verdict and judgment were for $15,000, and it is contended that the court erred in entering judgment for more than $10,000, the limit of recovery fixed by the statute of this state. It is argued that placing a limit upon the amount which can be recovered from the master for negligently causing the death of a servant is a regulation of the relation of master and servant with which Congress did not see fit to interfere in enacting the Federal Employers' Liability Act, and that therefore the limitation of the state statute applies to such a cause of action. The cause of action sought to be enforced in this case was created by the Federal statute. No cause of action existed at common law for damages on account of death caused by a wrongful act. The statute of this state creating a liability in such cases had been in force for many years before the enactment by Congress of any employers' liability act. Under its provisions employers engaged in interstate commerce were liable for damages occasioned by the death of their employees while engaged in interstate commerce, caused by the negligence of such employers. This was because Congress, though having power to regulate the liability of employers engaged in interstate commerce for injuries to their employees while engaged in such commerce, had not acted on that subject. Congress having now as-

sumed control of the subject by the enactment of the Federal Employers' Liability Act, its control is exclusive and the law of this state is no longer applicable, but the Federal act, alone, governs. (*Mondou* v. *New York, New Haven and Hartford Railroad Co.*, 223 U. S., 1; *St. Louis, San Francisco and Texas Railway Co.* v. *Seale*, 229 *id.*, 156.) The cause of action of the defendant in error is founded on the act of Congress, and none of the provisions of the state statute apply to it. The act authorizes the recovery of damages and places no restriction on the amount, and therefore no limitation applies except that of the damages actually sustained.

The deceased left a widow and one son, ten years old, and the plaintiff in error contends that the judgment should be reversed because the jury did not apportion the damages between the widow and the son. The defendant in error, upon leave granted, has filed a copy of the brief filed by the plaintiff in error in the Appellate Court, from which it appears that this point was not raised in that court, therefore it cannot be raised here.

Complaint is made of the first instruction given on behalf of the defendant in error, which was as follows:

"The court instructs the jury that prior to and on the 20th day of June, 1910, there was a certain act of Congress in full force and effect, which provided, among other things, as follows: 'That every common carrier by railroad, while engaging in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier in commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier.' Said act also provides: 'That in all actions hereafter brought against any such common carrier by railroad, under

or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.' "

It is argued that this instruction authorized the jury to find a verdict for the plaintiff if any negligence was proved, whether that charged in the declaration or not. The instruction did not direct a verdict, but was a preliminary instruction calling the attention of the jury to the act on which the action was based, which must be the basis of their deliberation. It was followed by an instruction telling the jury that the instructions given were one connected body or series and should be so regarded and treated by the jury,—that is, they should be applied to the facts as a whole and not detached or separated, any one instruction from any or either of the others. In other instructions the negligence charged in the declaration was required to be proved as the basis of a recovery, and the jury were instructed that the defendant was not liable for any negligence except that charged in the declaration, and that before the plaintiff could recover he must prove that the defendant was guilty of the negligence charged against it in the declaration and that such negligence was the proximate cause of Mason's injury. There is no ground for supposing the jury misunderstood the issue. The instruction stated all of the act which was applicable to the case.

It is insisted that if this part of the act was given to the jury they should also have considered Section 4, which provides that in cases brought under the act the employee shall not be held to have assumed the risks of his employment in any case where the violation by the employer of any statute enacted for the safety of employees contributed to the injury or death of such employee. Neither the plaintiff's

nor the defendant's case depended upon this section in any particular or was affected by it in the slightest degree. It had no application to the case.

The trial court did not commit error, and the judgment of the Appellate Court is affirmed.

JUDGMENT AFFIRMED.

ARGUMENT.

Plaintiff in error's assignment of errors filed in this court contains 38 assignments of alleged error. These assignments, however, are so general and indefinite, that we are unable to determine for a certainty the particular alleged errors upon which it relies. The practice of assigning such a large number of general and indefinite assignments of error has been frequently condemned by this court. (*Central Vermont Ry. Co.* v. *White, Admx.*, 238 U. S., 507.)

We shall, however, briefly refer to the questions which we anticipate counsel will seek to raise.

First.

It will be observed the Supreme Court of Illinois said:

"The deceased left a widow and one son, ten years old, and the plaintiff in error contends that the judgment should be reversed because the jury *did not apportion the damages between the widow and the son.* The defendant in error, upon leave granted, has filed a copy of the brief filed by the plaintiff in error in the Appellate Court, from which it ap-

pears that this point was not raised in that court, therefore it cannot be raised here."

The record does not show that the point referred to was even mentioned in the trial court, and in the circumstances we call upon opposing counsel to point out wherein and how they claim this question was raised and saved. At any rate, it has been authoritatively decided that it is not necessary that the jury should apportion the damages in a case like this. (*Central Vermont Ry. Co.* v. *White, Admx.*, 238 U. S., 507.)

Second.

It will be noted that the Illinois Supreme Court also said:

"The verdict and judgment were for $15,000, and it is contended that the court erred in entering judgment for more than $10,000, the limit of recovery fixed by the statute of this state. It is argued that placing a limit upon the amount which can be recovered from the master for negligently causing the death of his servant is a regulation of the relation of master and servant *with which Congress did not see fit to interfere* in enacting the Employers' Liability Act, and that therefore the limitations of the state statute applies to such a cause of action."

We call upon opposing counsel to point out wherein and how they claim this question is a federal question, and wherein and how they claim it was raised and saved.

But, assuming, for sake of argument, that the question is a federal question, and that it was properly raised and saved, we think it is wholly without merit.

They claim that as the Act in question does not place an *arbitrary limit* upon the amount recoverable in such a case, that therefore the *arbitrary limit* placed by the state statute, to-wit, ten thousand dollars, must govern. This we deny.

Congress has fixed the amount of damages recoverable under the Act, by the next of kin of a deceased employee, and the Act of course supersedes the state statute in that regard. The state Act limits the right of recovery in cases of death by wrongful act *to the pecuniary damages actually sustained* by the deceased's next of kin, and *also* provides that such damages shall not in any case *exceed* the sum of $10,000. The Federal Act also limits the right of recovery in such cases to *the pecuniary damages actually sustained* by the deceased's next of kin (*M. C. R. Co.* v. *Vreeland,* 227 U. S., 59), but unlike the state Act, it does not place any *arbitrary limit* on the amount of such recovery.

In other words, the Federal Act provides that recovery may be had for the *full* pecuniary damages actually sustained by the next of kin, whereas the state Act provides for but a *partial* recovery in cases where the *full* pecuniary damages actually sustained exceeds ten thousand dollars. It is thus evident that the Federal Act does cover the entire subject as to the amount of damages recoverable in such cases, and it follows that it supersedes the state Act in that regard.

In *M. C. R. Co.* v. *Vreeland, supra,* the court, in speaking of the amount recoverable in such cases, said:

"We may not piece out this Act of Congress by resorting to local statutes of the state of procedure or that of the injury. * * * By this act Congress has undertaken to *cover the subject* of liability of railroad companies to their employees injured while engaged in interstate commerce. The exertion of a power which is granted in express terms *must supersede all legislation over the same subject by the states.* * * * It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, *this act is paramount and exclusive,* and must remain so until Congress shall again remit the subject to the reserved police power of the states."

To the same effect are also *M. K. & T. Ry.* v. *Wulf,* 226 U. S., 570; *St. L. & S. F. R.* v. *Seale,* 229 U. S., 158; *St. L. I. M. & S. Ry.* v. *Hesterly,* 228 U. S., 703.

In *Thornbro* v. *K. C. M. & O. Ry. Co.,* 91 Kan., 684; 139 Pac. Rep., 414, a judgment was sustained under the act in question for an amount in *excess* of that allowed by the state statute, and upon this point the court said:

"The amount is larger than is allowed by our statute for death by wrongful act, but the Federal statute, which, as we have seen, governs the controversy, contains no such limitation."

See, also, to the same effect, *I. C. R. Co.* v. *Doherty's Admr.,* 153 Ky., 363; 155 S. W., 1119; *L. & N. R.* v. *Stewart's Admr.,* 157 Ky., 642; 163 S. W., 755; *C. & O. R.* v. *Dwyer's Admr.,* 157 Ky., 590; 163 S. W., 752.

Third.

We apprehend that counsel will claim that deceased was not employed in interstate commerce at

the time of his injury and death, and that, consequently, recovery was not authorized under the Federal Employers' Liability Act. We also anticipate that they will claim that this is a federal question, and that it was raised and saved by the request and refusal of plaintiff in error's peremptory instruction.

We do not concede that it is a federal question, or that it was sufficiently raised and saved in the manner indicated, or otherwise, but *assuming, for sake of argument,* that it is a federal question and that it was sufficiently raised and saved, it is clearly *a question of fact,* and we think the court should treat the state court's finding in that regard as final.

In 3 Foster on Fed. Prac.—5th Ed.—p. 2396, it is said:

"A question of fact decided on by a jury in a state court cannot be re-examined by the Supreme Court of the United States upon writ of error."

In *M. K. & T. R. Co.* v. *Haber,* 169 U. S., 613, it was held:

"The Supreme Court cannot enter into the inquiry whether the finding of the jury in a state court is against the evidence; it can only consider, in the case, whether the state statute as interpreted is in violation of the federal constitution."

In *Southern Ry. Co.* v. *Carson,* 194 U. S., 136-140, it was said:

"Whether the cars in question were used in moving interstate traffic and whether the coupling appliances were defective or not, were facts left to the jury and determined by their verdict."

At any rate, this court will not go further than to inquire as to whether there is *any evidence* in the record which fairly tends to prove that deceased

was employed in interstate commerce at the time of his injury and death. The record has not yet been printed, and under the rules and practice of the clerk of this court, plaintiff in error would not ordinarily be called upon to advance the money with which to print the record until this cause was closely approaching hearing.

It is sufficient, however, if such parts of the testimony as are necessary to the disposal of this motion are otherwise brought to the attention of the court. (*Lazarus, Michel & Lazarus* v. *Prentice,* 234 U. S., 263.) We shall herein print such extracts from the testimony as we think will be sufficient for the disposal of the motion. These extracts we shall quote from our brief filed in the State Supreme Court, and we do not think counsel will challenge their correctness.

We shall herein refer to the abstract and record pages referred to in our state Supreme Court brief, and this for the purpose of enabling counsel to verify the quotations and statements which we make.

It was stipulated that plaintiff in error was a common carrier by railroad and engaged in interstate commerce at the time in question (Abst., 17), and hence, the only debatable question is as to whether deceased was then "employed in such commerce."

Counsel will no doubt concede, as they did in the state court, that if there was one or more cars, either loaded or empty, in deceased's train, which was then being moved upon an interstate journey, that deceased was necessarily employed in interstate commerce, within the meaning of the Act. (See *St. L. & S. F. R. R. Co.* v. *Seale,* 229 U. S., 157;

S. A. L. R. v. *Moore,* 228 U. S., 433; *Johnson* v. *G. N. R. Co.,* 102 C. C. A., 89; *N. C. R. Co.* v. *Zachary,* 232 U. S., 248.)

Plaintiff in error's road was six or seven thousand miles in length and but one-fifth or one-sixth of the road was in Illinois. (Abst., 17.) All of its cars were used indiscriminately in moving both interstate and intrastate traffic. (Abst., 18, 25; Rec., 88, 89.) In addition to its own cars, it hauled cars of practically all the roads in the country (Abst., 19), and these foreign cars were likewise indiscriminately engaged in both interstate and intrastate traffic. (Abst., 20, 21, 25.) Interstate and intrastate cars were hauled in the same trains (Abst., 20) and over the same tracks (Abst., 17) and by the same crews. (Abst., 20.) Deceased's switching crew regularly switched both kinds of traffic indiscriminately (Abst., 24, 25) and with the same engine (Abst., 22.) It received cars from and delivered cars to the Pan Handle road (which is also referred to as the Pennsylvania road) (Rec., 82), at the place from which the train in question started, viz., 103d street, or Washington Heights. (Abst., 23.) Deceased's crew was regularly engaged *daily* in delivering cars to and receiving cars from the Pan Handle road at that place. (Abst., 23.) "The Pan Handle road runs from Chicago down through points in Indiana, to Cincinnati and Pittsburgh. It cuts off from the northern portion of Illinois into Indiana. * * * It was admitted that the Pan Handle road runs through Indiana to Ohio, and that there is only probably *25 to 40 miles of it in Illinois.*" (Abst., 19.)

The *train in question* was made up of cars received from the Bridge Works, and other industries, and the Pan Handle at Washington Heights, *but principally from the Pan Handle.* (Abst., 45.) Deceased's conductor. in speaking generally of the character of the cars which the crew were accustomed daily to receive from the Bridge Company, said:

"*We get cars out of there for all points.* Q. That is what I mean, *for points in Illinois and for points outside of Illinois.* A. *Yes, sir.*" (Rec., 106, 107; Abst., 23.)

And in speaking of the cars which the crew were accustomed to receive daily from the Pan Handle at that place, he said:

"Q. But they *mostly* came over the Pan Handle *from the eastern states,* didn't they? A. *I suppose they did.*

"Q. And those cars were both loads and empties? A. Yes, sir.

"Q. Some of them Pan Handle cars and some of them Rock Island cars being returned, were they? A. Yes, sir.

"Q. In fact, various kinds of cars. A. Yes, sir.

"Q. *Made up of indiscriminate traffic of all kinds?* A. *Yes, sir.*

"Q. *And by all kinds I mean interstate and state and everything else.* A. *All kinds of foreign cars.*" (Rec., 107, 108; Abst., 23.)

This evidence at least tended to show that *most* of the cars which this crew got *daily* from the Pan Handle at 103rd street were cars from the eastern states, and that the trains thus delivered by the Pan Handle to the Rock Island were made up of indiscriminate traffic, state and interstate. The evi-

dence further shows that the train in question was no exception to the general run of traffic received at that place.

In speaking of what *the train in question* was composed of *on the day of the accident*, the conductor said:

"Q. The day of this accident you were returning from the Pan Handle, the Bridge Works, with a train for the Burr Oak yards? A. Yes, sir.

"Q. *They were made up indiscriminately of the same kind of stuff you have spoken of?* A. *Yes, sir.*

"Q. *The foreign cars and your own cars?* A. *Yes, sir.*

"Q. CARS FROM OUT OF THE STATE *and cars from in the state?* A. YES, SIR, *I suppose they had come from the East.*

"Q. SOME CARS GOING OUT OF THE STATE *and some going to points in the state?* A. YES, SIR." (Rec., 110; Abst., 24.)

We think these last two questions and answers constitute direct proof which, in itself, at least tends to show that there was one or more cars in the train in question which came from out of the state, and that there was one or more cars in the train which was going out of the state, and as there was no evidence to the contrary this evidence was in itself sufficient on this point. As will be observed, the Supreme Court of Illinois took this view of this testimony.

Again, Nestrick, the fireman, *in speaking of the train in question*, said:

"Q. The big end of the train was loads? A. Yes, I guess.

"Q. From its pull, is that right? A. Yes.

"Q. *Made up of all kinds of cars?* A. *Yes, sir.*

"Q. *That is, by that, foreign cars and your own cars, and going here, there and every place?* A. *Yes.*" (Rec., 188; Abst., 41.)

Going "here, there and every place" in the sense in which the words were used clearly meant, and were doubtless understood as meaning to points in and out of the state, and if so this evidence was likewise direct proof which at least tends to show that there was one or more cars in the train which was being moved on an interstate journey.

Again, Gibson, the rear switchman, *in speaking of the train in question,* said:

"Q. Did you get all those cars in the Pan Handle yard? A. Yes, sir—I could not say that.

"Q. Well, you got *most* of them? A. We got *most* of them there. It is customary to pick the cars—

"Q. I don't care about the custom. There were loads and empties, were there? A. Yes, sir.

"Q. *Foreign cars and Rock Island cars?* A. *Yes, sir.*

"Q. *Cars for all points of the country perhaps?* A. *Yes, sir.*" (Rec., 201; Abst., 44.)

This evidence likewise at least tends to show that there was one or more cars in the train which was then traveling upon an interstate journey.

We think it clear that the foregoing evidence, *considered as a whole,* at least *tends to show* that there was one or more cars in the train in question, which was then traveling upon an interstate journey, and that is sufficient.

Fourth.

It will probably be claimed that there was no evidence tending to show that plaintiff in error was

guilty of negligence as charged. We anticipate that it will be claimed that this is a Federal question, and that it was raised and saved by the request and refusal of plaintiff in error's peremptory instruction. We do not concede that it is a Federal question, or that it was sufficiently raised and saved in the manner indicated, or otherwise.

But assuming, for sake of argument, that it is a Federal question, and that it was sufficiently raised and saved, it is clearly *a question of fact*, and we think that this court should treat the finding of the trial court, the Appellate Court, and State Supreme Court, as final in that regard. We shall, however, briefly call attention to *some* of the evidence, which at least tends to support the finding that plaintiff in error was guilty of negligence as charged.

Defendant in error's evidence as to the speed of the train, immediately preceding the stop in question, was *in part* as follows:

Wozinak: "About six or five miles an hour." (Abst., 16.)

Cates: "Around four or six miles an hour." (Abst., 25.)

Koch: "About five miles an hour." (Abst., 29.)

Morgan: "Between five and six miles an hour." (Abst., 37.)

Miles: "About five or six miles an hour." (Abst., 37.)

Plaintiff in error claimed in the state courts that the train was stopped at a customary time and place, and that it was stopped in order to permit the air connection to be made between the first 22 cars and the last 23 cars of the train, the connection not having been made at that point in the train, whereas,

defendant in error claimed that it was not necessary or customary to stop the train at the place in question, but that it was only necessary and customary for it *to slow up* at that place so that the rear switchman, who stood at the switch, would have time to close the switch and run after and board the train.

Bowman, the conductor, a witness for plaintiff in error, on cross examination, testified in part as follows:

"Q. You know that twenty-three cars, or whatever it was, or a quarter of that many cars would be plenty, an abundance *so far as the air was concerned* to take your train down to Blue Island, you know that, don't you? A. Do I know what?

"Q. *It was not necessary to couple your train at all in order to carry it down to Blue Island, was it?* A. *No, it was not necessary.*

"Q. In other words, four or five cars would have answered all the purposes? A. No, hardly.

"Q. *Well, twenty-three cars would, wouldn't they?* A. *Well, yes, twenty-two.*

"Q. And you didn't intend to couple up any more did you?

(Objected to as immaterial and irrelevant.)
(Rec., 240, 241.)"

And Nestrick, the fireman, who was in defendant's employ at the time of the trial (Rec., 185) testified:

"Q. And in pulling out there *the only thing that was to be done,* the hind man had to close up the switch and then run and jump on the train and you would go on to Blue Island, is that right? A. Yes, sir." (Rec., 188.) * * *

"Q. So that just the instant the wheels of the rear car went over the point the switch could be closed? A. Yes, sir." (Rec., 189.) * * *

"Q. When a man closes the switch, all he does is

to take a few steps, *run for the car* and jump on, that is right, isn't it? A. Yes.

"Q. And these slight applications you were *accustomed to make at that time* were so that the train would not run away from the man? A. Yes, sir.
* * *

"Q. *It was not customary to stop it, was it?* A. *No, sir.*" (Rec., 191; Abst., 42.)

This evidence shows that it was not necessary or customary to *stop* the train at the place in question.

The evidence also shows that deceased was not giving a signal for the train to *stop* at the time it stopped, but was merely giving a signal for the train *to slow up,* so that the rear brakeman at the switch could close the switch after the train had passed, and could then run after and catch the rear car.

Gibson, the rear switchman, a witness for plaintiff in error, testified in part as follows:

"Q. What are the signals that you men give ordinarily? *What is standing holding your hands out at length?* A. *It is an easy signal.* * * * That is a signal—*a proper signal for a man to shut an engine off and not to make a stop.*

"Mr. Bell: Let the record show that Mr. McShane at that time was standing *with both arms extended* with his palms down. * * *

"Witness: *That is a sign for a man to shut off.*
* * *

"Q. But that holding your arms out is to shut off? A. *That is an easy sign for a man to shut off.*

"Q. *And let them drift?* A. *And let them drift.* (Rec., 209.)

" * * * That is a sign for a man to shut off and has been all over the country ever since I have been railroading since 1887. * * *

"Mr. McShane: Q. It does not make any difference then when the arms are extended whether the

palms are up or down? A. It does not make a particle of difference; it is all the same." (Rec., 213.)

The testimony of the engineer was to the same effect. (Rec., 225; Abst., 50.)

The undisputed evidence shows that at the time of the accident deceased was giving the signal above described, that is to say, he was standing with his arms extended, and was not moving them either up or down.

Miles testified that he saw deceased standing on top of a box car about the middle of the train, and "about six or eight feet from the end of the car * * * from the south end of the car." (Rec., 172, 173; Abst., 38.)

And in describing what deceased was doing, he said he

"was standing *with his arms out like this.*

"Mr. McShane: The gentleman *sticks his arms out with his hands open.*" (Rec., 174; Abst., 39.)

* * *

And again he said:

"Q. Did you see Mason giving any signs at the moment he fell or the moment before he fell? A. He had his hands up like this (*indicating by extending both arms with his palms open*)." (Rec., 178; Abst., 40.)

And Wozniak said that he saw the train passing, and saw deceased standing on top of a box car, near the middle of the train and that he stood "about four feet from the end of the car, from the head end of the car." (Rec., 68; Abst., 15.)

And as to what deceased was doing, he said that he was "holding his hands on the top of the car like that (indicating). Q. *Now you have got each hand*

extended out even with your shoulder? A. *Yes, sir.*" (Rec., 67; Abst., 15.)

And again, the witness illustrated deceased's actions "*by holding his arms out at length* * * * with his hands open." (Rec., 72; Abst., 16.)

Jaskowiak testified that he saw the train passing and saw deceased on top of the car and that:

"He was standing about between three and four feet from the end of the car *with his hands out this way* (indicating)." (Rec., 53, 54; Abst., 11.)

It will thus be seen that deceased was merely signaling for the train to slow up. But it is admitted that the train was then stopped, and the evidence as to the character of the stop was in part as follows:

John Snyder testified that he was 57 years old and conducted a boarding house and saloon at the northwest corner of 105th street and defendant's tracks at the time of the accident and for 19 years prior thereto (Abst., 6); that he was standing in his window looking at the train at the time of the accident (Abst., 7); that deceased was standing a little south of the middle of the car

"and all at once there came *such a jar that my house was shaken* and the dust was flying, the coal dust, and you could see it, and my wife was in the kitchen and she comes out to me, 'Papa, what has happened.' There was such a crash that I looked out and the first thing I know I didn't see no man on the car no more. (Abst., 7.) I could nothing see, the dust and the car shaking like that" (indicating by shaking his hands). (Rec., 38, 9; Abst., 7.)

He further said that he had worked on railroads, as a section hand, for three years, and that he had

seen trains moving up and down, and stopping there for 19 years, but that:

"I never heard such a crash, *I never heard such a crash before.* (Abst., 7.) * * *. The crash was so sudden it shook up everything. * * * *My window was rattling* when the crash came. (Rec., 46; Abst., 9.) That was something *unusual* that I never heard before * * * a sudden crash that I never heard before on no railroad." (Abst., 9.)

And Mrs. Snyder testified:

"I am the wife of Mr. Snyder who testified this morning. I was in the kitchen. I heard *the terrible crash* it made, just shook me so *it nearly rattled the house,* and I ran for my husband and said: 'For goodness sake,' etc. * * * (Rec., 76; Abst., 16.) I have lived along the tracks there 19 years. *This was no crash like any other train stopping. It was such a horrible crash, it just frightened me.* I saw the train. * * * I saw dust from the train. It seems it come flying from all the cars." (Abst., 17.)

Frank Loddick testified that he was 54 years old, had worked for the Bridge Company 20 years, and was in the company's yard at the time of the accident and in describing the stopping of the train, he said:

"I heard a hammering together so I looked up. I thought maybe the whole car had gone to pieces. (Abst., 32.) * * * She run like a switching train always goes, then it stopped in one jerk. There was a heavy noise. They had some iron on the front part of the same train and I thought this iron come off the front car of the train. That is the reason I looked up * * * *The noise was twice or more louder than at other times and I see them switching cars there all these years.* (Abst., 33.) I saw some people all come out to the fence * * * *I heard the noise.* I turned my face around towards the north side *and they started to run there.* (Rec.,

146.) * * * They (cars) stopped so fast the jerk goes through the whole train." (Rec., 147; Abst., 33.) "*It was the loudest crash I ever heard. I seen everybody start to look to see what was going on.*" (Abst., 34.)

Louis Straub testified that he had worked as a machinist for the Bridge Company three years, and that at the time of the accident he was standing in the shop alongside of his machine close to the door, and he said:

"The first I noticed was the crash. * * * *It was a loud crash.*" He further said that he had seen cars switched there nearly every day, and that the crash must have been louder than usual to attract his attention. (Rec., 151; Abst., 34.) And on cross, he said:

"Q. This was the loudest crash you ever heard was it? A. Well, it was, on the Rock Island, yes, switching there." (Rec., 154; Abst., 35.)

Sam Cates testified that he was 28 years of age, and was running a milling machine inside the Bridge Company's shop and about 150 feet from the tracks, and that he was watching the train through the shop window at the time of the accident, and he said:

"All at once there was a crash just like that (indicating by clapping hand) and I seen the smoke from a carload of soft coal, the dust from a carload of soft coal, just flared up like a house on fire. It was pretty loud." (Abst., 25, 26; Rec., 116, 117.) He further said that he had been working there about a year and a half and had seen trains passing every day, and that "*I would not have noticed it if it had been an ordinary stop. It was much louder * * * This was something out of the ordinary.*" (Rec., 118; Abst., 26.)

"Q. What did you see the men in the shop do, if anything? A. *I saw them begin to stir around, rush around and go out of the door.* * * * I am speaking of what they did *just after the crash.*" (Rec. 120; Abst., 26.)

H. G. Koch testified that he was 45 years old, was a machinist in the employ of the Bridge Company for three years, and that he was standing by his machine in the shop, and saw the train through an open door and window passing; that he had seen trains moving up and down and stopping every day for three years, and that he had once worked as a locomotive fireman for a short time. (Rec., 134; Abst., 29.) In speaking of the stop he said:

"*It was the most unusual stop I ever saw,* so sudden and the noise attracted my attention; it was a crash as if cars would come together real hard." (Abst., 29.)

He further said that immediately upon hearing the crash he saw the other men in the shop run out and he ran out, too. (Abst., 30.)

J. J. Coombs testified that he was 45 years of age and had been a stationary engineer in the employ of the Bridge Company for 25 years, and had seen trains pass daily during that time. He said he saw the train stop, and that, "There was a kind of a crash, come to a sudden stop. * * * *It was different from the ordinary stop is what attracted my attention* * * * *louder.*" (Rec., 158; Abst., 36.) He further said that "When I heard the crash I seen the men running from the shop." (Abst., 36.)

Joe Wozniak testified that he was 32 years old and was the boss of a gang of men in the Bridge Company's yards (Rec., 66), and that at the time of the

accident he was in the yards on top of a pile of iron about 50 feet from the fence. (Abst., 15.)

In speaking of the character of the stop, he said:

"It stopped hard *and made a big noise. I never heard a noise like that and I saw trains every day there* * * * for five years." (Rec., 68; Abst., 15.) He further said: "The train go fast before the man stick out his hands—about six or five miles an hour, and then *when he had his hands out it stopped and he went over.*" (Abst., 16.)

C. B. Morgan testified that he was 39 years old and worked as a shipping clerk for the Bridge Company for 18 years, and that "at the time of the accident I was within 50 feet of the railroad track. I saw the train pulling by the shop and heard *a terrific crash.* I turned around and saw Mr. Mason lying beside the tracks. I hadn't seen him before the crash." (Abst., 36 and 7.)

"Q. You have seen trains pass there every day? A. Yes, sir.

"Q. Was this crash *different from the ordinary ones or not?* A. *Yes, sir, it was.*

"Q. In what way? A. It was very much louder. I haven't heard a crash similar to that for a long while." (Rec., 164; Abst., 37.)

J. M. Miles testified that he was 50 years old; that at the time of the accident he was foreman for the Bridge Company in its yard and had worked there 21 years and was within 30 or 40 feet of the train at the time the accident occurred; that he saw the deceased standing on top of a box car. (Abst., 37.) He said the train was running "at the rate of about five or six miles an hour," and that deceased was standing on top of the car about the center of the train, and

the conductor on top of the car near the forward end of the train, and that when the crash came "*the conductor rolled over on the car but didn't fall off.* I saw Mason go down and helped pull him out from under the train." (Abst., 37.) He said that he had observed trains pass there every day (Rec., 171), and on cross he said:

"Q. That is the loudest crash you ever heard out there in 25 years, isn't it? A. *I was there 21 years, never saw anything like it.*" (Rec., 177; Abst., 40.)

He further testified:

"Q. Was that any different from the ordinary bumping of the cars? A. There was nobody paid any attention to it ordinarily, but this time when it stopped, the neighbors all ran out when this crash came." (Answer stricken out; Rec., 169.)

"The Court: It may be competent for him to state what, if anything, he saw at the very moment of the crash or immediately following the crash.

"Q. Now, you heard what the court said. Tell what you saw, if anything, about anybody moving just *at the moment of the crash or instantly after.* A. Well, it was genuine excitement everybody, even run out of the blacksmith shop, everybody run out of the riveting shop to know what had happened." ("To know what had happened" stricken out; Rec., 170.)

"Q. What did you see the people do, if anything, *right after the crash?* A. I did see them run any place. They all ran right to the fence." (Rec., 171; Abst., 38.) He further testified that there were two cars in the train loaded with iron which he (the witness) loaded in the Bridge Company's yard, and in describing how it was loaded, he said that it was "loaded right on the floor of the car with a big load on top * * * a big load on top putting timbers on top carrying stuff that reaches over two cars * * * fastened with anchor bolts right down through the stake * * * stake and irons but the

load they put timbers across, an overhang load, so it overhung two cars, that is we take bolts and run them through the stake pieces and through the timbers, *clamping it down so there is no chance of shifting;* that is the way we load it.

"Q. *And that stuff shifted?* A. *Yes, 16 to 18 inches.*" (Rec., 168, 169.)

He testified that the train remained there from ½ to ¾ of an hour after the accident, and that "I went up to the iron after it shifted * * * the whole load shifted. * * * I didn't replace the loads of these two cars of steel. It was in the Rock Island's charge then." (Abst., 39, 40.)

Valentine Jaskowiak testified that he was in the employ of the Bridge Company for 10 years prior to the accident, and that he was in the Bridge Company's yard, about 80 feet from the track upon which the train was moving and in speaking of the stop, he said: "It was a sudden stop, a sudden crash, it was pretty loud, real loud, I saw the dust flying out of the coal car. * * * *It was an unusual stop* * * * it made a crash; *I never saw a train stop as hard as that before and I had worked there over ten years.*" (Abst., 12.) He said there was one or two cars of structural iron in the train that had been loaded by the Bridge Company, and was pulled out of its yard that morning, and that this iron was shifted by the stop. In this connection he said:

"I don't know if it was one car or two, and *that iron on the car over where we placed it moved about a foot.* It was building iron on a flat car lying on the floor." (Abst., 11.)

Further, he said:

"Q. By the way, was this iron loaded in the ordinary way in which such iron is shipped? A. Yes, sir. * * *

"Q. Was that wiring and such like such as is ordinarily sufficient for the journey? A. Yes, sir." (Abst., 14; Rec., 62.)

He further said that he saw the deceased standing on top of the box car immediately before the stop, but that he was not looking at him when he fell and that he helped to take deceased from under the car. (Abst., 11, 12.)

Wozniak and Miles further testified that when the crash came, deceased was thrown over the south end of the car and fell down between the cars and under the train. (Abst., 15, 39.)

It is thus apparent that there was abundant evidence that defendant was guilty of negligence.

The foregoing are the only questions which we anticipate counsel will raise, and we, therefore, respectfully request that the writ of error either be dismissed, or the judgment affirmed, and as we think it is plain that the writ of eror was sued out solely for the purpose of delay, we ask that additional damages be assessed and awarded defendant in error as for the delay, etc.

If neither of these motions is allowed, we request that the case be transferred for hearing to the summary docket.

Respectfully submitted.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 391

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN F. DEVINE, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM J. MASON, DECEASED,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT.

The judgment complained of in the proceedings on this writ of error is one for $15,000, obtained by the defendant in error against plaintiff in error on a cause of action for damages alleged to have been sustained on account of the death of William J. Mason, an employe of

plaintiff in error. The declaration was in one count, and it was therein attempted to state a cause of action under the Federal Employers' Liability Act. The only negligence alleged was that of the engineer in the management and operation of the engine. In this state the burden of proof is upon the plaintiff in an action of this nature to show that the deceased was not guilty of any negligence which contributed in any manner to the accident. If the Federal Employers' Liability Act was engaged by the facts the Illinois rule above mentioned would not apply.

Defendant in error's intestate was killed by falling from the top of a box car during a switching movement with a string of cars that was being taken from the yards of the Panhandle Company over a switch or lead track connecting with plaintiff in error's railroad, under circumstances hereinafter set out.

ARGUMENT.

I.

THE COURTS OF ILLINOIS HAVE DECIDED AGAINST CERTAIN RIGHTS AND IMMUNITIES CLAIMED UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

a.

There were no facts in evidence to constitute the engaging of this federal statute.

1. The finding of fact that deceased, at the time of the injury, was engaged in interstate commerce, is without support in the evidence.

2. Such a claim involves a federal question which is reviewable on this writ of error.

Defendant in error's intestate was a switchman in a crew of five men, consisting of an engineer, a fireman, two switchmen, and a foreman. The deceased was one of the switchmen. It was the duty of this switching crew to do miscellaneous switching, first in one part of plaintiff in error's yard and then in another part. It was also its duty to switch cars to and from industries, place them for loading, unloading, etc., and to switch cars to and from the yards of other railroad companies. But it was distinctly a switching crew and its work consisted of switching movements exclusively.

The railroad yards of plaintiff in error were just at the edge of the limits of the City of Chicago, in the State of Illinois. The railroad yards of the Panhandle were located at 103rd street, Chicago, and the main line of plaintiff in error's railroad, at a point two or three miles north of plaintiff in error's yards. On the morn-

ing of, and somewhat prior to the accident, this crew had been switching cars in the Panhandle yard and in and around certain industries in the vicinity of 103rd street, particularly the Bridge Works. After the crew's work was about completed, forty-five cars had been lined up in the Panhandle yards to be taken to plaintiff in error's yards above mentioned. These forty-five cars were cars from the Panhandle yards and cars from industries. The evidence shows the point of origin and point of destination of but two of these forty-five cars. They originated at the above mentioned Bridge Works and were destined to Fernwood, State of Illinois. It was when the crew started to return with the forty-five cars to plaintiff in error's yards that the accident occurred. The construction of the Federal Employers' Liability Act for which defendant in error contended, and which construction the trial court acceded to, is shown by the second "subhead" under the first division of defendant in error's brief in the Appellate Court:

> *"Deceased was employed in interstate commerce because of the character of his regular employment in which he was engaged at the time of the accident."*

The argument under this subhead proceeded upon the theory that, if the evidence showed that Mason was engaged in the performance, first, of an interstate duty, then an intrastate duty, and so on, if the majority of his duties were with reference to interstate traffic, if deceased's death had a tendency to stop the movement of other trains which might contain interstate traffic, then it was unnecessary to show that there was any interstate traffic in the particular train in question and that the Federal Employers' Liability Act applied, irrespective of whether it was shown what particular service it was that the deceased was performing at the time of the in-

jury, and the argument was based upon the decision in the case of *Behrens* v. *I. C. R. R. Co.* as it was reported in 192 Fed., 582. At the time of the trial of the case in question, in fact at the time of the handing down of the opinion in this case by the Appellate Court, this court had not reversed the above mentioned decision of the Circuit Court of the United States for the Eastern District of Louisiana. Defendant in error thought, as did the judge for the said Circuit Court of the United States, that, considering the status of a railway as a railway for both interstate and intrastate commerce, and the interdependence of the two classes of traffic in point of movement, etc., the difficulty of classifying the interstate and intrastate duties of a switching crew, that the liability of plaintiff in error for the death of a switchman in a switching crew while it was engaged in its general work was governed by the Federal Employers' Liability Act, whether the particular service which was being performed by the deceased at the time of the injury was shown to be interstate commerce or not. In other words, in getting this case ready for trial, defendant in error did not attempt to show, nor did he contend, upon the motion to take the case from the jury, that he had shown that the particular service in which the deceased was engaged at the time of the injury was shown. The evidence to which defendant in error has directed the court's attention on page 19 of his argument in support of the motion to dismiss the writ of error is conclusive of the above statement and shows just what defendant in error thought it was necessary to prove in order to constitute the engaging of the federal statute. We call the court's attention particularly to this character of evidence.

When this case got into the Supreme Court of Illi-

nois, and prior to the opinion in said case of the Supreme Court of Illinois, this court had decided the case of *Illinois Central R. R. Co.* v. *Behrens,* 233 U. S., 473, and upheld the contention which plaintiff in error in the case under consideration had made from the beginning, namely, that the particular service in which an injured employe is engaged at the time of the injury must be shown to be interstate commerce before the Federal Employers' Liability Act applies. After the decision in the Behrens case, it was necessary for the defendant in error and he did contend in the Supreme Court of Illinois that the evidence showed that the deceased was engaged in interstate commerce, under the proper construction of the Federal Employers' Liability Act, at the time of the injury. We denied all along, and now deny, that such is the fact. The Supreme Court of Illinois, in upholding the judgment of the trial court, picked out from all the evidence the answer "Yes" in response to the leading question asked by counsel for defendant in error: "Some cars going out of the state and some going to points in the state?" and held that this answer showed that the particular service in which the deceased was engaged at the time of the injury was interstate commerce. This question and answer follow other questions and answers in the record, as hereinafter set out:

"Q. The day of this accident you were returning from the Pan Handle, the Bridge Works, with a train for the Burr Oak yards?

A. Yes, sir.

Q. *They were made up indiscriminately of the same kind of stuff you have spoken of?*

A. *Yes, sir.*

Q. *The foreign cars and your own cars?*

A. *Yes, sir.*

Q. *Cars from out of the state and cars from in the state?*

A. *Yes, sir, I suppose they had come from the East.*

Q. *Some cars going out of the state and some going to points in the state?*

A. *Yes, sir.*" (Rec., 110; Abst., 24.)

It is our contention that the question and answer upon which the Supreme Court of Illinois solely relied must be taken into consideration, along with the other questions and answers which the witness made in order that a fair understanding may be had of his testimony. Plaintiff in error does not deny that this string of cars in question contained cars belonging to plaintiff in error and cars belonging to other railway companies. It does not deny that some of the cars had at sometime in their existence come from points out of the state, but it does deny that any of the evidence, and especially that which has been particularly referred to, shows that any one of those cars was on an interstate trip. It is possible that some of the cars were going out of the state sometime thereafter, but if they were to be loaded with traffic to be transported out of the state, after they had been taken to plaintiff in error's yards, that would not determine the character of service being performed at the time of the injury. It is possible that some of the cars had come from points out of the state sometime in the past, but there is nothing to show that the particular movement in question was a continuation of an interstate movement. If some of the cars had come from points outside of the state, loaded with traffic which had been unloaded here in Chicago and was at the time in question being transferred to be again loaded, proof of such facts would not aid defendant in error's case. Beyond a doubt most every one of those cars had sometime in the past come from points outside of the state. As a matter of fact, the witness did not pretend to know

the point of origin or point of destination of any of said cars, and there never was any contention on the part of either party at the trial that he had such knowledge. He was a member of a switching crew. It did not make any difference where the cars came from or what their ultimate destination was. He picked them up at industries and at the Panhandle yard and was to take them to plaintiff in error's yard. Whether they were to be unloaded at the latter point, whether they were cars to be loaded, whether they were going to other industries to be unloaded, other railroad yards to be transferred to industries to be unloaded, or to other points in the State of Illinois or to points outside of the State of Illinois, were questions with which he had no concern whatever. This trial was had two years after the accident occurred. If the witness ever knew the point of origin or point of destination of any car in that string, he of course could not have testified to the facts without identifying records, and there were no records. We call the court's attention to the opinion of the Supreme Court of Illinois, and especially that part thereof which appears on pages 8 and 9 of defendant in error's argument in support of the motion to dismiss. At the bottom of page 8 it is said:

> "In answer, however, to the question 'some cars going out of the state and some going to points in the state' the witness answered, 'Yes.' This evidenced that some of the cars in the train were engaged in an interstate trip—at least that one of them was. It is slight, but it is not contradicted."

No matter what the views of any of us are about this case, there is certainly one point upon which we will all agree with the Supreme Court of the State of Illinois, and that is that "it is slight." If plaintiff in error could inject the Federal Employers' Liability Act into cases by such evidence as this, it would indeed be for-

tunate for it. We claimed, and now claim, that there is no support in the evidence for such a finding of fact.

This question may be considered by the court on a writ of error to a state court. A federal right has been denied as a result of a finding of fact which is without support in the evidence. *So. Pac.* v. *Schuyler,* 227 U. S., 601, 611. The claim that defendant in error did not show that at the time of the accident deceased was employed in interstate commerce is a question which can now be reviewed.

Nor. Car. R. R. Co. v. *Zachary,* 232 U. S., 248, at p. 257.

St. Louis & Iron Mountain R. R. Co. v. *McWhirter,* 229 U. S., 265, at 275 and 277.

Seaboard Air Line v. *Padgett,* 236 U. S., 668, at p. 673.

Central Vermont Ry. Co. v. *White,* 238 U. S., 507, at p. 509.

The claim was raised, denied and the point saved by plaintiff in error when its motion to direct a verdict at the close of all the evidence was overruled and when said ruling of the court was excepted to. Not only the Appellate Court of Illinois, but also the Supreme Court of Illinois considered and passed upon this claim contrary to plaintiff in error's contentions. (See that part of the opinion of the Supreme Court which appears at pages 8 and 9 of the defendant in error's argument in support of the motion to dismiss.) Even if, according to the procedure of this state, the claim had not been properly raised prior to the time the Supreme Court was reached, the fact that the Supreme Court in its decision considered and passed upon the question shows that it was raised for the purpose of this court's consideration on a writ of error.

Nor. Car. R. R. Co. v. *Zachary,* 232 U. S., 257.

b.

The judgment was for a sum in excess of that recoverable under the Federal Employers' Liability Act in this state.

1. Such a claim involves a Federal question reviewable in this writ of error.

The Federal Employers' Liability Act depends for its constitutionality upon the "Commerce Clause" of the Federal Constitution. There was power in Congress to regulate the *relations* between a common carrier and its employe only when by so doing it was at the same time making valid regulations as to interstate commerce. In *Second Employers' Liability Cases,* 223 U. S., 1, at page 48, the court said:

> "In view of these settled propositions, it does not admit of doubt that the answer to the first questions before stated must be that Congress, in the exertion of its power over interstate commerce, *may regulate the relations of common carriers by railroad and their employes,* while both are engaged in interstate commerce. * * *"

It was interstate commerce, then, that was primarily regulated by the passage of the Federal Employers' Liability Act.

The regulations of commerce, in respect to the power of Congress and the power of the state, have been divided into three classes. First, those over the subject matter of which the states have exclusive jurisdiction even though they may affect interstate commerce indirectly or remotely, such regulations having to do with strictly internal commerce. Second, those regulations over the subject matter of which the states have jurisdiction in the absence of any regulation by Congress on such subject matter; such regulations being those which indi-

rectly affect interstate commerce, but the subject matter of which, while dealing in a way with interstate commerce, is local in its nature, and does not require uniform regulation throughout. Third, those regulations over the subject matter of which Congress has exclusive jurisdiction, such regulations being national in their character and the subject matters of which will admit only of uniform action,—impositions by way of taxation, discrimination, or regulation of interstate commerce, being examples. As to regulations the subject matter of which come within the second classification above mentioned, inaction by Congress on any particular subject matter leaves the state free to regulate that subject matter until Congress acts, while as to those regulations the subject matter of which belong in the third classification, inaction by Congress is significant of its *intention that such subject matter shall be unrestricted.*

As the subject matter of a regulation of interstate commerce, a relation of master and servant comes within the second classification. In *Mo. Pac.* v. *Castle,* 224 U. S., 541, at page 544, the court said:

> "The decision in the Mondou case sustaining the validity of the Federal Employers' Liability Act practically forecloses all question as to the authority possessed by the State of Nebraska by virtue of its police power to enact the statute in question and to confine the benefits of such legislation to the employes of railroad companies; and as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employes, under the conditions shown in this case, the state was not debarred from thus legislating for the protection of railway employes engaged in interstate commerce."

Then the state has power to regulate all the relations

between master and servant, even though both are engaged in interstate commerce, until Congress acts with reference to some particular relation. When Congress passes a law affecting any such relation, that relation is no longer a proper subject matter of regulation by the state. In passing the Federal Employers' Liability Act, what relations between master and servant did Congress regulate? Section I abolished the "fellow-servant" rule. Section III so regulated one of the relations between master and servant that, when a cause of action is prosecuted under said act, contributory negligence cannot be pleaded in bar. Section IV regulated a relation between master and servant by abolishing the defense of assumed risk, in certain cases. Section V did away with any contract, rule, regulation or device tending to destroy the cause of action created. Section VI regulated a relation between master and servant in that it provided that the action created must be commenced within two years. Section VIII regulated such a relation by providing that nothing in the act should be held to limit the duty or liability of common carriers under any other act or acts of Congress, or impair the rights of other employes under any other such act or acts. The act approved April 5, 1910, amending Section VI of the prior act, thus regulated a relation between master and servant by making the jurisdiction of the state and United States courts concurrent and prohibiting removal. Prior to the passage of the above mentioned act there was no provision for the survival of the action which an injured person had if he should die. Section IX thus regulated this relation between master and servant by providing for such survival to the injured person's personal representative.

But not all of the relations between master and servant were so regulated. There is no provision in the act regulating the manner, form or issuance of process by

which service may be had on a defendant when it is sued; or with reference to the paper filed pretending to state the cause of action; or with reference to the other pleadings. There are no such provisions regulating the admission or exclusion of evidence in such a case as to whether witnesses under certain circumstances are qualified to testify. The relations between master and servant, even when limited to those concerning the prosecution of causes of action for injuries, are so numerous that it would have been impossible for Congress to have regulated each one of them without making the Federal Employers' Liability Act assume the proportions of a code of laws. And yet such relations not regulated by Congress are in existence in the respective states as they were prior to the above mentioned enactment. A case, prosecuted in a state court under said act, is dealt with today as the same kind of a case, prosecuted in said state prior to the said act, would have been dealt with, except in so far as *particular relations* between master and servant have been changed by the Federal Employers' Liability Act. A cause of action prosecuted under said act, in Illinois, is stated in a declaration, which must conform to common law rules. A similar cause of action prosecuted under the same act in a code state must conform to the code of that state. If in one state there is a law which excludes the evidence of a physician as to a communication made by his patient, without the patient's consent, that law will apply as well to a suit under the Federal Act as to one prosecuted by a servant against his master under the state law. The absence of such a law in another state, under a similar cause of action so prosecuted, leaves the physician free to testify without restriction. The explanation for this is simple. Prior to the Federal Employers' Liability Act each state regulated the relations between master and servant even

as to injuries incurred in interstate commerce. In passing said act Congress took certain of those relations from the domain of state regulation. But not by any means all of them, for, as we have said before, such an attempt on the part of Congress would have taken an act much more extensive than the one under consideration. Those relations not regulated by Congress were left within the power of the states to regulate as if no Federal act existed. If the Federal act had made no mention of contributory negligence, that would not have signified its abolition. Under such circumstances, the rule of contributory negligence, the effect of such proof, the burden of proof, etc., would be in accordance with the law of the particular state where the cause of action was being prosecuted. The fact that Congress regulated some relations between master and servant did not mean that those remaining were to be left unregulated. If Congress had not said that the cause of action created should be brought within two years after its accrual, it would not be said suit could be instituted at any time thereafter. A Federal Employers' Liability Act, so drawn, would be construed as creating a cause of action but leaving the time within which suit must be brought thereon to the regulation of the particular state on that particular relation.

The Federal Employers' Liability Act said that: "Every common carrier * * * shall be liable in damages. * * *" It did not regulate that relation between a common carrier and its employes as to the amount of recovery. Regulations as to the amount of recovery in such actions are regulations of a relation between master and servant which the state had power to and did regulate prior to the Federal enactment. As that relation was not regulated by Congress, a regulation in the state

over such subject matter is proper. The State of Illinois has regulated this relation and has said that the pecuniary damages recoverable shall not exceed the sum of $10,000. We claimed in the trial court, in the Appellate Court, and in the Supreme Court that under the proper construction of the Federal Employers' Liability Act the judgment should not have been for a greater sum than $10,000, which claim was denied.

Such a question is subject to review on this writ of error. In *St. L. & Iron Mtn. Ry.* v. *McWhirter,* 229 U. S., 265, at page 275, this court said:

> "It is true that although the case was exclusively rested upon Federal statutes, as it comes here from a state court, our power to review is controlled by Rev. Stat., Sec. 709, and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result."

The case of *St. L. & Iron Mtn. Ry.* v. *Taylor,* 210 U. S., 281, was brought by an administratrix to recover damages on account of the death of one Taylor in the course of his employment as brakeman in the service of the railroad. The right to recover was based solely on the failure of the defendant to equip two cars which were to be coupled with such drawbars as were required by the Safety Appliance Act. The railroad company objected to an erroneous construction of the said act, which erroneous construction warranted, on the evidence, a judgment against it. It insisted upon a correct construction, which, on the evidence, warranted a judgment in its favor. The court held that the denial of such a

claim was a Federal question, subject to review on such a writ of error. At page 293 the court said:

> "The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."

In *Seaboard Air Line Ry.* v. *Horton*, 233 U. S., 492, at 499, the court said:

> "There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the Employers' Liability Act was especially set up or claimed in the state court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act which, if acceded to, would presumably have produced a verdict in its favor, and consequently immunity from the action, this motion must be denied, upon the authority of *St. Louis, Iron Mountain & Southern Ry.* v. *McWhirter*, 229 U. S., 265."

Under these and other decisions of the court, there can be no doubt that our contention, as to the proper construction of the Federal Employers' Liability Act, may be given consideration in this court on a writ of

error to the Supreme Court of Illinois. The question was raised in the trial court upon a motion for a new trial, which was overruled, and to which ruling plaintiff in error saved an exception. It was again raised on a motion in arrest of judgment, which motion was overruled, and to which ruling plaintiff in error again saved an exception. Plaintiff in error also excepted to the court's action in entering judgment on the verdict and excepted to the judgment. This question was raised in the Appellate and Supreme Courts of Illinois, in and for the First District, by appropriate assignments of error, and the said Court after considering, in their opinions, the contention herein made denied to plaintiff in error its claim. A reading of the opinion of the Supreme Court of Illinois, which has been quoted in statement filed by defendant in error in support of motion to dismiss, will show that in the Supreme Court plaintiff in error contended for the same construction of the Federal Employers' Liability Act that it has herein contended for and that said claim was denied. (See page 10, defendant in error's brief and argument in support of motion.) Even if this claim had not been properly raised in the trial court, or in the Appellate Court, the fact that the state Supreme Court assumed that a Federal question was presented by the record and decided that question against the party asserting it, this court would have jurisdiction for review. In *North Carolina R. R. Co.* v. *Zachary, etc.*, 232 U. S., 248, at page 257, the court said:

> "In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial court in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the Act of Congress, and the

highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question. *Home for Incurables* v. *City of New York*, 187 U. S., 155, 157; *Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S., 177, 179; *Haire* v. *Rice*, 204 U. S., 291, 299; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S., 142, 148; *Miedreich* v. *Lauenstein*, decided this day, *ante*, p. 236."

c.

The finding of negligence on the part of plaintiff in error is without support in the evidence.

1. Such a claim involves a Federal question reviewable in this court.

Proof of negligence of the engineer was relied upon to substantiate liability with plaintiff in error. Plaintiff in error contended, and now contends, that there was no negligence shown on the part of the engineer; that if it is true that the deceased fell from the train because of a bump when it stopped, that bump was not the fault of the engineer in any way, but resulted from the fact that the air operating the brakes had not been cut in on the last twenty-three cars. Prior to moving out on the main line, the string of cars were in two line-ups of twenty-two and twenty-three cars, respectively. The crew did not cut in the air on the last twenty-three cars because that would have necessitated blocking the 103rd street crossing too long. They were going to cut in the air after getting out on the main line, and it was for this purpose that the stop was made which is said to have caused the deceased to fall from the top of a box car. According to a number of the defendant in error's witnesses, this train, just prior to the said stop, was

moving "slower than a man could walk," or two or three miles an hour. When the engineer got his signal he made a slight service application of the air. This fact is not denied. As the air had only been cut in on the first twenty-three cars, these were the only cars upon which the brakes set when the service application was made. At this time the deceased was from twenty-five to thirty cars from the engine. When the brakes were set on the first twenty-two cars, the slack in the other cars was taken up and when the slack was taken up there was more or less of a bump. But this was something over which the engineer had no control whatever. It may be that there was negligence on the part of one or more of the other employes, but we deny that negligence on the part of the engineer was shown.

Such a claim is reviewable on this writ of error.

Central Vermont Ry. Co. v. *White,* 238 U. S., 507, at 509.

St. Louis and Iron Mountain Ry. Co. v. *McWhirter,* 229 U. S., 265, at 277 and 281.

The claim was raised, denied and saved in the proper manner and the Supreme Court considered it and decided it in opposition to plaintiff in error's contention. (See Supreme Court opinion, page 9, plaintiff in error's brief on motion to dismiss.)

Conclusion.

In conclusion, we respectfully submit that the courts of Illinois denied to plaintiff in error rights and immunities claimed under the Federal Employers' Liability Act; that such rights and immunities were set up and claimed in the state courts; and that the denial of each and all of them so claimed raises a Federal question or

Federal questions which are reviewable upon this writ of error to the Supreme Court of the State of Illinois.

We respectfully insist, therefore, that defendant in error's motions to dismiss the writ of error, to affirm the judgment of the Supreme Court of the State of Illinois, to transfer the cause for hearing to the summary docket and to assess additional damages, and each of them, be overruled. There is no warrant for the statement that this writ of error was taken for delay.

Respectfully submitted,

M. L. Bell

Edw. P. Littlepage

Attorneys for Plaintiff in Error.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* DEVINE, ADMINISTRATOR OF MASON.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 391. Motion to dismiss or affirm submitted October 25, 1915.—Decided November 8, 1915.

In a suit in the state court under the Employers' Liability Act, defendant's contentions that plaintiff's intestate was not engaged in interstate commerce and that a state statute limiting amount of recovery controlled involve Federal questions, and, unless wholly frivolous, this court has jurisdiction.

In this case, however, as both of the propositions are so wanting in sub-

stance as not to require further argument, the judgment is affirmed under Rule 6, paragraph 5.

Previous decisions of this court have conclusively established the exclusive operation of the Employers' Liability Act over the subject with which it deals to the exclusion of all state statutes relating thereto.

266 Illinois, 248, affirmed.

THE facts, which involve the jurisdiction of this court to review a judgment of the state court on writ of error under § 237, Jud. Code, and the disposition of such writ when frivolous under Rule 6, par. 5, are stated in the opinion.

Mr. James C. McShane for defendant in error in support of motion to dismiss or affirm.

Mr. Thomas P. Littlepage and *Mr. M. L. Bell* for plaintiff in error in opposition to the motion cited:

Behrens v. *Ill. Cent. R. R.*, 192 Fed. Rep. 582; *Cent. Vermont Ry.* v. *White*, 238 U. S. 507; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142; *Haire* v. *Rice*, 204 U. S. 291; *Home for Incurables* v. *New York*, 187 U. S. 155; *Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Mo. Pac. Ry.* v. *Castle*, 224 U. S. 541; *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668; *Second Employers' Liability Cases*, 223 U. S. 1; *So. Pac.* v. *Schuyler*, 227 U. S. 601; *St. L. & Iron Mtn. R. R.* v. *McWhirter*, 229 U. S. 265; *St. L. & Iron Mtn. Ry.* v. *Taylor*, 210 U. S. 281.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

The recovery under the Employers' Liability Act in the trial court, affirmed by the intermediate and supreme court, was for the damage caused by the death of Mason through the negligence of the defendant company. 266